No. 06-1374

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SUPREME COURT, U.S.

In The Supreme Court of the United States

LASTING BEAUTY, L.L.C. and DENISE HUMPHRIES,

Petitioners,

v.

CITY OF CHESAPEAKE and JAMES T. DAVIS, CZA, Zoning Administrator,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ronald S. Hallman
Counsel of Record
Grady A. Palmer
OFFICE OF THE CITY ATTORNEY
306 Cedar Road
Chesapeake, Virginia 23322
(757) 382-6586

Counsel for Respondents

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Did the courts below err in failing to determine that the subject city zoning scheme governing tattooing unconstitutionally burdens free speech and expression rights guaranteed by the United States Constitution?

2. Did the courts below err in failing to determine that the subject city zoning scheme facially and as applied denies equal protection and due process rights guaranteed by the United States Constitution?

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BRIEF IN OPPOSITION FOR THE RESPONDENTS

OPINIONS BELOW

The Virginia Supreme Court's decisions to refuse the petition for appeal and to deny rehearing are not reported. The opinion of the Chesapeake Circuit Court is not reported.

JURISDICTION

The Virginia Supreme Court entered an order January 19, 2007 denying rehearing of a refused petition for appeal. The petitioners filed a petition for a writ of certiorari with this Court on April 16, 2007. The petition for writ of certiorari invokes this Court's jurisdiction under 28 U.S.C. §1257.

STATEMENT

The petitioners challenge the validity of a zoning ordinance enacted by the City of Chesapeake ("the City") that regulates the location of tattoo parlors. The trial court determined that the evidence offered by the petitioners did not demonstrate that the act of tattooing is sufficiently communicative to warrant First Amendment protection or that the zoning ordinance violates the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. Pet. App. 2-15. The Virginia Supreme

Court denied a petition for appeal by finding that the trial court committed no reversible error.

1. The Chesapeake Zoning Ordinance provides that a tattoo parlor must be located in the M-1 or M-2 (Industrial) zoning districts[1] and must obtain a conditional use permit and meet a distance requirement of 1000 feet from any other tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes. *See* CHESAPEAKE VA. ZONING ORDINANCE §§8-601.C.27 and 8-602.[2] The definition of a tattoo parlor includes the activity referred to by the petitioners as intradermal micropigmentation ("permanent make-up"). *See* CHESAPEAKE VA. ZONING ORDINANCE §3-403. Tattoo parlors are prohibited in the B-2

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[1] M-1 and M-2 are primarily zoning districts for industrial land uses but permit a range of permitted uses from general industrial machinery to hardware stores and churches. M-1 and M-2 zoning districts can be found in many places within the City. See Plaintiffs' Exhibit 5. Of course, City Council retains the right to rezone land to M-1 or M-2 that could expand the areas in which a tattoo parlor could locate. A site specific rezoning to support an identified land use is not uncommon.

[2] The City of Chesapeake adopted an inclusive zoning ordinance. An inclusive zoning ordinance is one that specifically lists permitted and conditional use (uses that require a conditional use permit approved by the governing body) for each zoning district. All land uses not specifically listed and not substantially similar to a listed use are considered prohibited in that zoning district. *See* CHESAPEAKE VA. ZONING ORDINANCE §§3-301 and 3-302.

(General Business) zoning district[3] because the list of permitted and conditional uses does not include a reference to tattoo parlors. The zoning ordinance does not regulate the display of tattoos by individuals, the process by which a tattoo is created, or the design and form that a tattoo can take. It also does not regulate the operation of a lawful tattoo parlor.[4] The zoning ordinance only regulates the location at which a tattoo parlor can operate.

2. The petitioners operate a tattoo parlor limited to the practice of intradermal micropigmentation ("permanent makeup"). Pet. 3. There is no claim that the petitioners have performed or would perform any other form of tattooing.

3. In May of 2003, the City, through its Zoning Administrator, issued a notice of violation to the petitioners for operating a tattoo parlor in the B-2 zoning district. The petitioners appealed that notice of violation to the Chesapeake Board of Zoning Appeals ("the BZA"). The BZA approved the notice of violation by finding that the petitioners' business

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[3] The B-2 zoning district generally provides for the location of commercial land uses. Typical land uses are restaurants and retail stores.

[4] In accordance with Title 54.1 of the Code of Virginia, the Board for Barbers and Cosmetology regulates the tattoo parlor industry. In addition, Virginia Code §15.2-912 allows localities to regulate the sanitary condition of a tattoo parlor which the City of Chesapeake has done by enacting Chesapeake City Code sections 38-201 through 38-213.

constitutes a tattoo parlor and is located in the B-2 zoning district.[5]

4. After the BZA approved the notice of violation, the respondents filed their complaint with the Chesapeake Circuit Court seeking injunctive relief.[6] The petitioners filed a cross bill asserting rights under the Fourteenth Amendment, including free speech, due process and equal protection.[7] The trial court granted the respondents' request after finding that, based on the evidence at trial, the act of tattooing is not sufficiently communicative in nature to warrant protection under the First Amendment. Pet. App. 9-10.[8] The trial court noted that few courts have addressed the issue and, of those that have, the

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[5] In an appeal of a notice of violation, the BZA determines whether to "reverse or affirm, wholly or partly, or "modify an order, requirement, decision or determination appealed from." Virginia Code §15.2-2312.

[6] The petitioners filed an appeal of the BZA's decision with the Chesapeake Circuit Court but later dismissed it because Virginia law prohibited the petitioners from arguing that the zoning ordinance was unconstitutional or invalid in that procedural context. *See Board of Zoning Appeals v. University Square Assocs.*, 246 Va. 290, 435 S.E.2d 385 (1993).

[7] Former Virginia Supreme Court Rule 2:13 (rules for proceedings in equity) allowed a defendant to file a cross bill against a plaintiff. In this case, the petitioners sought relief in the cross bill by asking the trial court to declare the zoning ordinance invalid on grounds that it violates, among other things, the Fourteenth Amendment, including free speech, due process and equal protection.

[8] The final order entered by the trial court on May 3, 2006 granted the respondents' motion to strike the evidence offered in support of the petitioners' cross bill.

majority have concluded that the act of tattooing is not communicative in nature. Pet. App. 8-9. Since the trial court did not find evidence that the act of tattooing is sufficiently communicative it did not decide whether the zoning ordinance facially or as applied violated the First Amendment. In fact, the petitioners appear to have conceded an "as-applied" challenge by offering testimony characterizing micropigmentation; "we're not displaying hearts, or roses, or crosses, or anchors, it's replacing what nature has taken away for [sic] a woman as we age, or was never there to begin with." Tr. of Proceedings dated September 1, 2005 at 91. In addition, the trial court found that the respondents produced no evidence to establish that the zoning ordinance violates the Equal Protection and Due Process clauses of the Fourteenth Amendment. Pet. App. 12-14. The trial court found that the zoning ordinance does not establish classifications that are inherently suspect and, given its analysis of the First Amendment issue, the zoning ordinance does not infringe on a fundamental right. Pet. App. 12. Furthermore, the trial court found that the zoning ordinance does not create classifications on its face and the petitioners failed to produce any evidence that the zoning ordinance establishes a discriminatory classification. Pet. App. 13. The petitioners' Due Process claims also were not supported by any evidence. Pet. App. 13-14.

5. The petitioners sought review of the trial court's final order in the Virginia Supreme Court and was denied based on the court's judgment that that the record contained no reversible error. A motion for rehearing was also denied. Pet. App. 1 and 16.

ARGUMENT

The decisions by the Virginia Supreme Court to refuse the petition for appeal and motion to rehear are correct and do not conflict with a decision of this Court, a United States court of appeals or a state court of last resort. Therefore, this case does not warrant review by the United States Supreme Court.

1. The petitioners would not have standing at the federal trial court level and therefore cannot request relief from the United States Supreme Court by writ of certiorari to the Virginia Supreme Court on the First Amendment issues. While the petitioners were named as defendants at the trial court they were also plaintiffs. The petitioners responded to the respondents' bill of complaint for permanent injunction with a cross bill that requested the trial court to declare the zoning ordinance invalid based on, among other things, the purported constitutional rights raised in this petition. By challenging the zoning ordinance on a cross bill, the petitioners have placed themselves in the position of a plaintiff at the trial court level for purposes of evaluating whether they can now seek federal review of a state court decision on the issues raised in the cross bill. *See generally Virginia v. Hicks*, 539 U.S. 113 (2003) and *Asarco, Inc, et al. v Kadish, et al.*, 490 U.S. 605 (1989).

2. While it is true that the Court permits relaxed prudential limitations on standing in First Amendment cases, the petitioners do not appear to meet even the minimal standards outlined by this

Court in *Secretary of State of Md. v. Munson*, 467 U.S. 947 (1984). In *Munson*, a private fund raising company (Munson) challenged a Maryland statute that prohibited charitable organizations from paying expenses in an amount higher than 25% of the amount collected except in cases where a waiver of the limit applied. The Court opined that a litigant whose conduct is not protected by the First Amendment may challenge the facial validity of an overly-broad statute on appeal to this Court if the litigant satisfies Article III standing and "can be expected to frame the issues in the case." *Id.* at 958. The Court determined that Munson could assert the rights of charities because the fundraising activity "sought to be protected [was] at the heart of the business relationship between Munson" and the charities. *Id.* Furthermore, the Court found that "Munson's interests in challenging the statute are completely consistent with the First Amendment interest of the charities it represents." *Id.* The petitioners simply do not have the same relationship with other tattoo parlors as Munson had with charitable organizations.

The petitioners seek to challenge the validity of the zoning ordinance based on purported expressive conduct of other tattoo providers. Denise Humphries testified about permanent make-up that "we're not displaying hearts, or roses, or crosses, or anchors, it's replacing what nature has taken away for [sic] a woman as we age, or was never there to begin with." Tr. of Proceedings dated September 1, 2005 at 91. The petition is not clear on this point but it does not seem plausible for the petitioners to seek to raise the act of replacing a missing eyebrow or applying

permanent lip liner to the status of protected expressive conduct. Raising the purported rights of a tattoo provider who tattoos human skin to form letters, numbers or symbols seems to be the likely candidate for litigation on First Amendment issues and the object of this petition. While the respondents do not concede that any act of tattooing is sufficiently communicative to warrant First Amendment protection, to the extent that those tattoo providers could make such claims there is no good reason to allow the petitioners to litigate the issues on those parties' behalf.

There is simply no nexus between the petitioner and the purported First Amendment rights of other tattoo providers to expect the petitioners to satisfactorily frame the issues for those individuals. *See Munson* at 958. This explains why the trial court found little to no evidence to support the petitioners' First Amendment arguments. In fact, the petitioners appear to have a minimal understanding of the types of tattoos other tattoo providers may create by testifying that those individuals provide "...hearts, or roses, or crosses, or anchors..." Tr. of Proceedings dated September 1, 2005 at 91. The petitioners are not in a position to know the ins and outs of tattooing, other than permanent make-up, to articulate what qualities of the act of tattooing are expressive in nature and warrant protection under the First Amendment. Therefore, the petitioners should not be permitted on prudential grounds to challenge the zoning ordinance in this Court.

3. The Virginia Supreme Court correctly decided against hearing the merits of the petitioners' appeal

related to the constitutional issues. The central flaw of the petitioners' case is the near absence of any fact to support their constitutional arguments. Simply put, there is no evidence that a provider of permanent make-up or any other tattoo provider engages in expressive conduct. The trial court could not find that "the act of tattooing or applying permanent make up is intended to convey a particularized message and whether there is likelihood that the message would be understood by those who viewed it". Pet. App 9. By filing this petition, the petitioners ask this Court to divine that the act of tattooing in a tattoo parlor is imbued with communicative qualities sufficient to warrant First Amendment protection. There is simply no authority, besides an unreported opinion from a Massachusetts trial court, for the proposition that the act of tattooing another's skin constitutes expressive conduct protected by the First Amendment. On the contrary, well reasoned opinions from a state court of last resort and a federal district court conclude that the act of tattooing is not sufficiently communicative to warrant First Amendment protections. *See Yurkew v. Sinclair*, F. Supp 1248 (1980) and *South Carolina v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002). Even if the act of tattooing another's skin could constitute expressive conduct, this case fails to put that issue squarely before this Court.

4. The petitioners claim that there is a "significant and long-standing split in American jurisprudence regarding whether tattooing is an activity sufficiently imbued with communicative aspects to justify free speech and expression protection under

the First Amendment to the Constitution". Pet. 7. Hyperbole aside, the petitioners have not cited an opinion by a state court of last resort or a United States circuit court that conflicts with the decision by the Virginia Supreme Court in this case. This Court recently denied a petition for writ of certiorari to the South Carolina Supreme Court to review that court's analysis of a claim by a tattoo provider that tattooing is expressive conduct protected by the First Amendment.[9] The South Carolina Supreme Court opinion did not conflict with any opinion of this Court, any opinion of a state court of last resort or any opinion of a United States court of appeal. Nothing has changed since 2002 to warrant further review. Furthermore, the dearth of cases involving tattoo parlors and tattoo providers indicates that the issue is not an important question of federal law that should be settled by this Court.

5. The petitioners' equal protection and due process claims do not have merit. Unlike adult business ordinances, the zoning ordinance does not create classifications between the same land uses. In *Young v. American Mini Theatres*, the Court found that the zoning ordinance adopted by the City of Detroit differentiated between motion picture theatres by the types of movies exhibited. *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Theatres that exhibited sexually explicit movies were subject to standards different from those that did not. *See*

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[9] *White v. South Carolina*, 537 U.S. 825 (2002). South Carolina enacted a criminal law that prohibited tattooing except by a licensed physician for cosmetic or reconstructive purposes. *See South Carolina v. White*, 348 S.C. 532, 534, 560 S.E.2d 420, 421 (2002).

Young at 52. In contrast, all tattoo parlors in Chesapeake are subject to the same regulations in the zoning ordinance. Pet. App. 13. Since the zoning ordinance does not create any classification, an equal protect claim on this issue fails. Likewise, the petitioners' claim of selective enforcement, i.e. "class of one claim", was not supported by the evidence. Pet. App. 14.[10]

CONCLUSION

The petition for writ of certiorari to the Virginia Supreme Court should be denied

Respectfully submitted,

GRADY A. PALMER
Assistant City Attorney

RONALD S. HALLMAN
City Attorney

OFFICE OF THE CITY ATTORNEY
306 Cedar Road
Chesapeake, Virginia 23322
(757) 382-6586 (Telephone)
(757) 382-8749 (Facsimile)

Counsel for Respondents

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[10] The petition cites *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) but that case only involved a holding on what is required to plead a class of one to survive a FRCP 12(b)(6) motion. In this case, the trial court determined that the petitioners' evidence offered at trial did not support the claim.